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SUPREME COURT, U.S

No. 39

IN THE

Supreme Court of the United States

October Term, 1948

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL B-953, A. F. of L.,

Appellant,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, ET AL.

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

BRIEF FOR THE COMMONWEALTH OF PENNSYLVANIA, AMICUS CURIAE

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SUBJECT INDEX

	PAGE
I. Opinion of the Court Below	2
II. Statement as to Jurisdiction	3
III. Question Presented	4
IV. Statutes Involved	5
V. Statement of the Case	6
VI. Interest of the Commonwealth of Pennsylvania	8
VII. Summary of Argument	12
VIII. Argument	16
(1) The Labor Management Relations Act, 1947, does not ipso facto preclude state legislation applicable to the same situations covered by the federal statute	16
(2) The Bethlehem Steel Company decision has no application to the instant case	28
(3) Congress in enacting the Labor Management Relations Act, 1947, did not intend to strike down the Wisconsin Employment Relations Act	34
(4) The Labor Management Relations Act, 1947, does not exhibit a clear and manifest purpose of Congress to preclude the enforcement of state laws with respect to the investigation and certification of bargaining representatives	36
(5) Conclusion	43
IX. Appendixes:	
(1) Relevant provisions of the Labor Management Relations Act, 1947	45
(2) Relevant provisions of the Wisconsin Employment Peace Act	49

TABLE OF CASES CITED

Abbotts Dairies, Incorporated, Case, 341 Pa. 145 (1941) 9

Alabama State Federation of Labor etc., et al. v. MacAdory et al., 325 U.S. 450 (1945) 43

Allen-Bradley Local No. 1111 etc. et al. v. Wisconsin Employment Relations Board et al., 315 U.S. 740 (1942) 19, 21, 23, 43

Allen-Bradley Local No. 1111 etc. v. Wisconsin Employment Relations Board et al., 237 Wis. 164, 295 N.W. 791 (1941) 18

American Federation of Labor et al. v. Reilly et al., 113 Colo. 90, 155 P. 2d 145 (1944) 19

American Federation of Labor et al. v. Watson, 327 U.S. 582 (1946) 42

Bethlehem Steel Company et al. v. New York State Labor Relations Board, 330 U.S. 767 (1947) 10, 12, 27, 28, 29, 33

Carpenters and Joiners Union of America, Local No. 213 et al. v. Ritter's Cafe et al., 315 U.S. 722 (1942) 24

Christoffel et al. v. Wisconsin Employment Relations Board et al., 243 Wis. 332, 10 N.W. 2d 197 (1943); 320 U.S. 776 (1943) 23

Davega City Radio, Inc. v. State Labor Relations Board, 281 N.Y. 13, 22 N.E. 2d 145 (1939) 17

Equitable Gas Co.; Petition of, 51 D. & C. 653 (1944) 10

Food, Tobacco, Agricultural and Allied Workers Union of America, Local 186 etc. v. Smiley et al., 74 F. Supp. 823 (1946); 164 F. 2d 922 (1947) 11

Hill et al. v. State of Florida, 325 U.S. 538 (1945) 29, 42

Hines et al. v. Davidowitz et al., 312 U.S. 52 (1941) 28

Hotel & Restaurant Employees' International Alliance, Local No. 122 et al. v. Wisconsin Employment Relations Board et al., 315 U.S. 437 (1942) 23

International Brotherhood of Electrical Workers, Local No. 953, A. F. of L. v. Wisconsin Employment Relations Board et al., 245 Wis. 532, 15 N.W. 2d 823 (1944) 24

International Shoe Co. v. State of Washington etc., et al., 326 U.S. 310 (1945) 43

Kelly v. State of Washington, 302 U.S. 1 (1937) 21

National Labor Relations Board v. Eclipse Moulded Products Co., 126 F. 2d 576 (1942) 26

National Labor Relations Board v. Fainblatt et al., 306 U.S. 601 (1939) 35

National Labor Relations Board v. Falk Corporation, 308 U.S. 453 (1940) 41

National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U.S. 1 (1937) 35

National Labor Relations Board v. National Mineral Co., 134 F. 2d 424 (1943) 39

Packard Motor Car Co. v. National Labor Relations Board, 330 U.S. 485 (1947) 28

Pittsburgh Railways Company Substation Operators and Maintenance Employees' Case, 357 Pa. 379, 54 A. 2d 891 (1947) 10, 21

Reid v. Colorado, 187 U.S. 137 (1902) 21

Rice et al. v. Santa Fe Elevator Corporation et al., 331 U.S. 218 (1947) 34, 37, 39

Southern Pac. Co. v. State of Arizona, 325 U.S. 761 (1945) 22

Southern S. S. Co. v. National Labor Relations Board, 120 F. 2d 505 (1941) 39

Tennessee Publishing Co. v. American National Bank et al., 299 U.S. 18 (1936) 43

Thornhill v. Alabama, 310 U.S. 88 (1940) 24

Union Brokerage Co. v. Jensen et al., 322 U.S. 202 (1944) 38, 41

United Office and Professional Workers of America v. Smiley et al., 77 F. Supp. 659 (1948) 11

Warehousemen's Union etc. v. National Labor Relations Board, 121 F. 2d 84 (1941) 40

Wisconsin Employment Relations Board v. Algoma Plywood & Veneer Co., 252 Wis. 549, 32 N.W. 2d 417 (1948) 29

Wisconsin Employment Relations Board v. Milk & Ice Cream Drivers & Dairy Employees Union, Local No. 225, 238 Wis. 379, 299 N.W. 31 (1941); 316 U.S. 668 (1942) 23

Wisconsin Labor Relations Board v. Fred Rueping Leather Co., 228 Wis. 473, 279 N.W. 673 (1938) 17

York Corporation; In re, 55 D. & C. (Pa.) 337 (1945) 27

York Telephone and Telegraph Company Employes Case, 55 D. & C. 113 (1945) 10

STATUTES CITED

Labor Management Relations Act, 1947:

Section 9, 29 U.S.C.A., Section 159 45

Section 10 (a) 29 U.S.C.A., Section 160 (a) 16

Pennsylvania Labor Relations Act:
Section 3 (c), 43 PS, Section 211.3 9

Wisconsin Employment Peace Act:

Section 111.01 (4) 42

Section 111.05 24, 49

MISCELLANEOUS AUTHORITIES

ALR, Volume 174, at pages 1071, 1072 (1948) 20

46 Michigan Law Review 593, at page 609—Article by Russel A. Smith on "The Taft-Hartley Act and State Jurisdiction over Labor Relations" 32

Case Caption

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BRIEF FOR THE COMMONWEALTH OF PENNSYLVANIA, AMICUS CURIAE

I. OPINION OF THE COURT BELOW

The opinion of the Supreme Court of the State of Wisconsin is reported in 256 Wis. 583, 30 N. W. 2d. 541 (1947).

II. STATEMENT AS TO JURISDICTION

The Commonwealth of Pennsylvania makes no claim, (and does not admit), that the instant case is one over which the Court has jurisdiction under the provisions of Section 237 of the Judicial Code, 28 U. S. C., section 344, 28 U. S. C. A. section 344. (Act of Congress of February 13, 1925, C. 229, section 1, 43 Stat. 937; Act of Congress of January 31, 1928, C. 14, section 1, 45 Stat. 54).

III. QUESTION PRESENTED

The only question discussed in this brief is:

Whether jurisdiction of the Wisconsin Employment Relations Board, the agency administering the Wisconsin Employment Peace Act (Wisconsin Laws of 1939, Chapter 57, as amended by Wisconsin Laws of 1943, Chapter 375, Wisconsin Laws of 1945, Chapter 424 and Wisconsin Laws of 1947, Chapter 2; Chapter 111, Sub-Chapter I of the Wisconsin Statutes, Sections 111.01 to 111.09) has been ousted by paramount federal authority in the instant case?

IV. STATUTES INVOLVED

The relevant provisions of the Labor Management Relations Act, 1947, (Act of June 23, 1947, Public Law 101, 80th Congress, 1st Session, 29 U.S.C.A. 151 et seq. (1947 Pocket Part)), are set forth in Appendix 1, infra, pp. 45-48. The relevant provisions of the Wisconsin Employment Peace Act, (Wisconsin Laws of 1939, Chapter 57, as amended by Wisconsin Laws of 1943, Chapter 375, Wisconsin Laws of 1945, Chapter 424 and Wisconsin Laws of 1947, Chapter 2; Chapter 111), are set forth in Appendix 2, infra, pp. 49-51.

V. STATEMENT OF THE CASE

On October 8, 1946, the Telephone Guild of Wisconsin petitioned the Wisconsin Employment Relations Board to conduct an election to determine the desires of employees of the La Crosse Telephone Corporation as to their collective bargaining representative. The State Board conducted a hearing as a part of the investigation.

The company had been bargaining with the Petitioner, International Brotherhood of Electrical Workers, Local B-953, A. F. of L., on behalf of its employees in its plant and traffic department, there having been a contract which, by its terms, expired on December 1, 1946 (R. 19, 20, 23), which contract had an automatic renewal provision (R. 36). Petitioner had notified the employer on August 28, 1946, of a desire to amend the contract (R. 22, 25).

Negotiations were undertaken between the company and an employees' committee for amendments, which resulted in the acceptance of a modified proposal (R. 27, 29, 30).

In the meantime, the Guild, which had received applications for membership among the company's employees constituting more than 30 percent of those eligible for membership (R. 19), had petitioned the National Labor Relations Board to be certified as bargaining representative of the employees represented previously by Petitioner.

On October 8, 1946, the Guild filed with the National Labor Relations Board a request to withdraw the petition previously submitted (R. 18, 19), and filed a petition for election with the Wisconsin Board. There is nothing in the record to indicate that the National Labor Relations Board has ever, in any manner, exercised any of its powers or discretion or, otherwise, taken jurisdiction of any question or phase of the La Crosse Telephone Corporation's employment relations with any of its employees (R. 53).

The State Board conducted an election on November 27, 1946, at which a majority of the employees in the unit, previously represented by Petitioner, indicated a desire to have the Guild as their representative for future bargaining (R. 12, 13, 14).

The State Board certified the results of the election on January 14, 1947.

VI. INTEREST OF THE COMMONWEALTH OF PENNSYLVANIA

The Commonwealth of Pennsylvania has a statute, commonly known as the "Pennsylvania Labor Relations Act", being the Act of June 1, 1937, P. L. 1168, to be found in 43 PS, sections 211.1 to 211.13 inclusive, which as enacted was virtually a transcript of the National Labor Relations Act of July 5, 1935. By reason of amendments to the Pennsylvania Labor Relations Act, the statutes became somewhat divergent with respect to procedural provisions, but the two acts remained identical as to objects and purposes. The Pennsylvania statute, at no point, is either contrary or repugnant to the policies of Congress as set forth in the National Labor Relations Act of 1935, or its successor, the Labor Management Relations Act, 1947. It does not deprive any employee, subject to the jurisdiction of state authority, of rights protected or guaranteed by federal legislation.

The Pennsylvania statute provides for administration under two broad classifications. The first class has to do with the ascertainment of an appropriate bargaining unit and the certification of the collective bargaining representatives who shall have been designated or selected by the majority of the employees in that unit. The second class is for the prevention of unfair labor practices. Thereunder

the agency hears complaints, states findings of fact, and may make "cease and desist" orders or other orders appropriate to the effectuation of the policies of the Act.

Under the Pennsylvania Labor Relations Act, being the Act of June 1, 1937, P. L. 1168, as originally enacted, the Pennsylvania Labor Relations Board could not have had jurisdiction over any labor dispute involving Company and its employees, as Company is engaged in interstate commerce within the meaning of the National Labor Relations Act. In construing the original act, prior to the amendment of May 27, 1943, the Supreme Court of Pennsylvania had held that where a labor dispute was one affecting interstate commerce, it was excluded from the jurisdiction of the state board by the terms of the act itself: *Abbotts Dairies, Incorporated, Case*, 341 Pa. 145, 146 (1941). However, the Act of May 27, 1943, P. L. 741; 43 PS Section 211.3, by its title, amends Section 3, clause (c) of the Act by "including persons subject to the National Labor Relations Act in the definition of 'employer'", and by striking the words "or the National Labor Relations Act, as amended from time to time," from the exclusions from the definition of "employer." Thereafter, the Pennsylvania Labor Relations Board exercised concurrent jurisdiction in certification cases, because the Courts of Common Pleas of Allegheny County and York County, Pennsylvania, had held that, *under the Act as amended, in the absence of an exercise of jurisdiction by the National Board; the Pennsylvania Labor Relations Board has jurisdiction over a proceeding to certify a bargaining agent for the employees of*

an employer who is engaged in interstate commerce: Petition of Equitable Gas Co., 51 D. & C. 653, 661 (1944); *York Telephone and Telegraph Company Employes Case*, 55 D. & C. 113, 118 (1945).

After the decision of Your Honorable Court in *Bethlehem Steel Company, et al. v. New York State Labor Relations Board*, 330 U. S. 767, which was decided April 7, 1947, the Supreme Court of Pennsylvania, on September 29, 1947, handed down a decision in *Pittsburgh Railways Company Substation Operators and Maintenance Employees' Case*, 357 Pa. 379, 54 A. 2d 891, wherein it was held that *the criterion to determine the validity of the exercise of state power is not whether the agency administering federal law has acted upon the relationship in a given case, but rather whether Congress has asserted its power to regulate that relationship.* It was held that the Pennsylvania Labor Relations Board could not constitutionally entertain the petition for the bargaining agent of the employes in that case, upon a record showing that the National Labor Relations Board had never assumed jurisdiction over the employer or any of its employees, on the theory that Congress had asserted its power of regulation, and jurisdiction in the National Labor Relations Board was exclusive.

As a result of this decision of Pennsylvania's highest appellate court, many cases upon appeal from final orders of the Pennsylvania Labor Relations Board are now pending in the courts of Pennsylvania and, in two instances, the Board has been restrained by courts of the United States

from making investigations commanded by the Pennsylvania statute in cases involving employees of Pennsylvania employers. See

Food, Tobacco, Agricultural and Allied Workers Union of America, Local 186, *etc. v. Smiley et al.*, 74 F. Supp. 823 (1946); 164 F. 2d 922 (1947);

United Office and Professional Workers of America v. Smiley et al., 77 F. Supp. 659 (1948).

Wherefore, Pennsylvania, like Wisconsin, has a vital interest in the question: How far and to what extent is the Pennsylvania agency barred from administering the state statute by reason of the enactment of the Labor Management Relations Act, 1947?

VII. SUMMARY OF ARGUMENT

(1) The Labor Management Relations Act, 1947, does not ipso facto preclude state legislation applicable to the same situations covered by the federal statute, as there is nothing in the record showing that the employer, La Crosse Telephone Corporation ever was a party to any proceeding before the National Labor Relations Board and never was before the National Board in any proceeding or manner. The instant case comes squarely within the rule that unless or until the National Board has elected to exercise its jurisdiction over the particular controversy involving the same issues before the State Board, the State Board is free to exercise its jurisdiction under the analogous or consistent provisions of the State Act.

It is the established rule that the jurisdiction of a federal agency and a state agency is concurrent whenever the state legislation does not contravene the provisions of the federal legislation, (absent a clear and manifest purpose of Congress, to the contrary), except where the jurisdiction of the federal agency has, in fact, been invoked or exercised in the particular matter in controversy before the state agency.

(2) *Bethlehem Steel Company et al. v. New York State Labor Relations Board*, 330 U. S. 767 (1947), has no application to the instant case as there is nothing in that

case to indicate an intended ruling that a state agency is without power to administer the state act with respect to charges of unfair labor practices against employers, employees or unions provided that the state policy is not contrary or repugnant to federal policy.

The Bethlehem Steel Company case is an application of the doctrine that state regulation cannot be permitted to frustrate national policy especially where, as in that case, federal policy was definitely adverse to foremen unionization and not merely neutral in the matter.

It is because the National Labor Relations Board has never formulated a distinct policy with respect to the employees of local communications companies such as the La Crosse Telephone Corporation that the Bethlehem Steel Company decision is not controlling in the instant case.

(3) Congress in enacting the Labor Management Relations Act 1947 did not intend to strike down the Wisconsin Employment Peace Act under the rule that the historic police powers of states are not to be superseded by a federal act unless that was the clear and manifest purpose of Congress. This is especially true of the Labor Management Relations Act, 1947, because the scope of federal power may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.

(4) The Labor Management Relations Act, 1947, does not exhibit a clear and manifest purpose of Congress to

preclude the enforcement of state laws with respect to the investigation and certification of bargaining representatives.

As the purpose of the federal legislation is not primarily to regulate commerce but to secure and preserve industrial peace, it cannot be said that the federal interest is so dominant that the state be precluded from applying its own policy, when not inconsistent with federal policy, to secure and preserve industrial amity and good will.

Inasmuch as Wisconsin policy is neither contrary to, nor repugnant to federal policy, with respect to the determination of collective bargaining units, the holding of elections or the certification of bargaining representatives, the Wisconsin Employment Peace Act comes within the rule that the historic police powers of states are not to be superseded by a federal act unless that was the clear and manifest purpose of Congress.

The scheme of federal regulation provided for in the Labor Management Relations Act, 1947, should not be held to be so pervasive as to refuse to permit employees to select a bargaining agent under state authority.

The object sought to be obtained by the federal law and the character of obligations imposed by it do not show an intent on the part of Congress to bar the state agency from aiding the employees in the selection of their representative, especially as the order of certification imposes no obligation upon anyone and cannot be the subject of court review unless or until the state agency issues a future order which requires the employer to do something predicated upon the result of the election.

In view of the policy of the State of Wisconsin expressed in the Act, the Labor Management Relations Act, 1947, should not be held to impliedly evince an intent to strike down the Wisconsin statute or preclude its administration by the state agency.

(5) It is suggested that in this case no rule of constitutional law or statutory construction be applied which is broader than is required by the precise facts of the instant case; and that as neither the La Crosse Telephone Corporation, nor any of its employees have been subject to the jurisdiction of the National Labor Relations Board, the judgment of this Court below affirming the certification of a bargaining representative for the employees of the La Crosse Telephone Corporation in an appropriate unit should be affirmed because such proceeding was a valid exercise of the police power of Wisconsin.

VIII. ARGUMENT

(1)

The Labor Management Relations Act, 1947, does not ipso facto preclude state legislation applicable to the same situations covered by the federal statute.

In Petitioner's Brief, at page 7, it is said that "The National Labor Relations Board under the Wagner Act had exclusive jurisdiction of questions of representation affecting commerce," and that "The adoption of section 10(a) of the Labor Management Relations Act of 1947 shows that the Congress considers to be a reasonable solution to the problem of adjusting state and federal authority in the labor relations field. Congress has recognized the exclusive jurisdiction of the National Board and has provided for cession of such jurisdiction by the board under certain conditions and if the procedure of agreement between the state and national administrative agencies is followed."

The reasons urged by Petitioner to bar the states from exercising jurisdiction over labor disputes, if and when it is found that the employer is engaged in interstate commerce, or where the employer's operations affect interstate commerce, are substantially the same reasons which were urged to bar state jurisdiction during the

period that the National Labor Relations Act was in force and operation. The rule universally accepted by courts has been that the National Labor Relations Act did not ipso facto preclude state legislation applicable to the same situations covered by the federal statute. This rule was expressed in various ways. In *Davega City Radio, Inc. v. State Labor Relations Board*, 281 N. Y. 13, 22 N. E. 2nd 145, 147, 148, 149 (1939), a decision of the Court of Appeals of New York considering the New York State Labor Relations Act as originally enacted when it was virtually a transcript of the National Labor Relations Act, it was said by Finch, J., that (italics ours):

> "*From a study of authorities it does not appear that the National Labor Relations Act ipso facto precludes the State legislation applicable to the same situations.* * * * That the National Labor Relations Board is given exclusive jurisdiction under the National Act is of significance only in fixing the appropriate agency to enforce the National act, and is not relevant to the question whether a consistent State law may co-exist with a National Act.
>
> "*We reach the conclusion, therefore, that the State Labor Relations Board may enforce the State act at least until such time as it is ousted by the exercise by the National Labor Relations Board of its jurisdiction under the National act.* * * *"

In *Wisconsin Labor Relations Board v. Fred Rueping Leather Co.*, 228 Wis. 473, 279 N. W. 673, 677 (1938), wherein the Supreme Court of Wisconsin considered the

Wisconsin Labor Relations Act of 1937, which was repealed in 1939 when the Wisconsin Employment Peace Act was enacted, it was said by Wickham, J., that (italics ours):

> "It is not seriously contended that the Wisconsin act, which is conceded to be nearly identical both in purpose and method with the national act, discriminates against or unduly burdens interstate commerce. *The conclusion is inevitable that it constituted a valid exercise of the police power of this state even as to those labor relationships which fall within the commerce clause.* * * *"

In *Allen-Bradley Local No. 1111, etc. v. Wisconsin Employment Relations Board, et al.*, 237 Wis. 164, 295 N. W. 791 (1941), the contention was made that "The Wisconsin Act and the National Act both regulate the same subject; that the Wisconsin Act is so inconsistent with and in conflict with the National Act, in the public policy each Act seeks to enforce and in their major terms and provisions, that the two acts cannot consistently stand together, in so far as applicable to interstate commerce."

Chief Justice Rosenberry, in answering these contentions, said at page 800, that (italics ours):

> "Appellants specified nine ways in which the state and federal acts conflict but as already pointed out, *these conflicts do not exist until the National Labor Relations Act is applied by the National Labor Relations Board in a particular case. As has already been pointed out state power is not destroyed by federal*

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action, it is merely suspended in a particular case. If a man who owns and possesses a tool and is forbidden to use it, he still has the tool. He is deprived not of the tool but of the power to make use of it. The state is not deprived of its power to deal with labor relations by the National Labor Relations Act. Its power is suspended so far as is necessary to give effect to that act."

In *American Federation of Labor, et al. v. Reilly, et al.*, 113 Colo. 90, 155 P. 2d 145, 150, 151 (1944), a decision of the Supreme Court of Colorado, in a proceeding to test the constitutionality of the Colorado Labor Peace Act, which is patterned very closely on the Wisconsin Employment Peace Act, it was said by Knouse, J., with respect to *Allen-Bradley Local No. 1111 etc., et al. v. Wisconsin Employment Relations Board, et al.*, 315 U. S. 740 (1942), hereinafter considered in this brief (italics ours):

"* * * *the control which Congress, under the commerce clause, had asserted over the subject matter of labor disputes in passing the National Labor Relations Act, was not so pervasive or exclusive as to prevent Wisconsin, in the exercise of its police power, from enacting legislation regulating the type of employee or union activity involved in the challenged order, which was upheld. * * * Congress had 'designedly left open an area for state control,' and that conflicts between federal and state enactments, or orders arising therefrom, within that area should be resolved only upon 'concrete and specific issues raised by actual cases'.*"

Argument

There is nothing in the record which shows that the employer, LaCrosse Telephone Corporation was ever a party to any proceeding before the National Labor Relations Board. From all that appears of record, it has never been before the National Labor Relations Board in any proceeding or in any manner other than on some date prior to September 24, 1946, a petition for investigation and certification of bargaining representatives was filed with the National Labor Relations Board, which petition, on October 8, 1946 was withdrawn in order that the Wisconsin Employment Relations Board could conduct the election among the company's employes. By no stretch of the imagination can it possibly be concluded that federal jurisdiction was exercised and, accordingly, this case comes squarely within the rule succinctly stated in 174 A.L.R. 1071, 1072 (1948) that (italics ours):

> *"Unless or until the National Board has elected to exercise its jurisdiction under the national act over the particular controversy involving the same issues as those before the State board, the state board is free to exercise its jurisdiction under the analogous or consistent provisions of the state act. * * *"*
>
> *"And, conversely, it was held that the jurisdiction of the State Labor Relations Board may be ousted if the Federal Labor Relations Board has elected to exercise its jurisdiction over the particular matter in dispute under its authority under the national act. * * *".*

All judicial authority supports the view that the jurisdiction of a federal agency and a state agency is concurrent

whenever the state legislation does not contravene the provisions of the federal legislation—absent a clear and manifest purpose of Congress to the contrary—*except where the jurisdiction of the federal agency has in fact been invoked or exercised in the particular matter in controversy before the state agency*, and not the view expressed by the Supreme Court of Pennsylvania in *Pittsburgh Railways Company Substation Operators and Maintenance Employees case*, 357 Pa. 379, 54 A. 2d 891 (1947), of exclusive jurisdiction of the Federal agency unless or until federal jurisdiction is relinquished in favor of state jurisdiction. It was said by Chief Justice Hughes in *Kelly v. State of Washington*, 302 U. S. 1, 11 (1937), quoting from *Reid v. Colorado*, 187 U. S. 137, 149, 150 (1902), that (italics ours)

> "* * * *It should never be held that Congress intends to supersede, or by its legislation suspend, the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has been often reaffirmed that 'in the application of this principle the supremacy of an act of Congress in a case where the state law is but the exercise of a reserved power, the repugnance or conflict be direct and positive, so that the two acts could not be reconciled or consistently stand together'.*"

Clearly in point is *Allen-Bradley Local No. 1111, etc. et al. v. Wisconsin Employment Relations Board, et al.*, *supra*, wherein at page 741, it was said by Mr. Justice Douglas that (italics ours):

"*The sole question presented by this case is whether an order of the Wisconsin Employment Relations Board entered under the Wisconsin Employment Peace Act * * * is unconstitutional and void as being repugnant to the provisions of the National Labor Relations Act.* * * *"*

In this opinion, it was further stated by the Court at pages 745, 749 that (italics ours):

> "It was admitted that the company was subject to the National Labor Relations Act. The federal Board, however, had not undertaken in this case to exercise the jurisdiction which that Act conferred on it. Accordingly, the Supreme Court of Wisconsin upheld the order of the state Board stating that 'there can be no conflict between the acts until they are applied to the same labor dispute.' * * *
>
> * * * * * *
>
> "* * * this Court has long insisted that 'an intention of Congress to exclude states from exerting their police power must be clearly manifested'. * * *"

Particularly in point is *Southern Pac. Co. v. State of Arizona*, 325 U. S. 761, 766 (1945), wherein Chief Justice Stone said (italics ours):

> "*Congress, in enacting legislation within its constitutional authority over interstate commerce, will not be deemed to have intended to strike down a state statute designed to protect the health and safety of the public unless its purpose to do so is clearly mani-*

*fested, * * * or unless the state law in terms or in its practical administration, conflicts with the Act of Congress, or plainly and palpably infringes its policy. * * *"*.

It has been held by Your Honorable Court that cease and desist orders of the Wisconsin Employment Relations Board, entered against unions and employees for the violation of the several unfair labor practices enumerated in Section 6 of the Wisconsin Employment Peace Act, were not unconstitutional and void as being repugnant to the provisions of the National Labor Relations Act of 1935:

Hotel & Restaurant Employees' International Alliance, Local No. 122 et al., v. Wisconsin Employment Relations Board et al., 315 U.S. 437 (1942);

Allen-Bradley Local No. 1111 etc., et al. v. Wisconsin Employment Relations Board et al., supra;

Wisconsin Employment Relations Board v. Milk & Ice Cream Drivers & Dairy Employees Union, Local No. 225, 238 Wis. 379, 299 N.W. 31 (1941), certiorari denied 316 U.S. 668 (1942);

Christoffel et al. v. Wisconsin Employment Relations Board et al., 243 Wis. 332, 10 N.W. 2d 197 (1943), certiorari denied 320 U.S. 776 (1943).

In the last mentioned case, wherein it was a matter of record that the union was the bargaining representative of the employees by virtue of a certification previously made by the National Labor Relations Board, it was said by Fowler, J., that (italics ours):

" • • • there was no conflict of jurisdiction because proceedings between the interested adverse parties had been before the national board involving matters not in issue before the state board."

The judgment of the Court below should be affirmed because "*the rights of employers and employees to conduct their economic affairs, and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist*" and because the certification procedure provided for in Section 111.05 of the Wisconsin Employment Relations Act is but an instance "*of the power of the State to set the limits of permissible contest open to industrial combatants.*":

Thornhill v. Alabama, 310 U.S. 88, 103, 104 (1940);

Carpenters and Joiners Union of America, Local No. 213 et al. v. Ritter's Cafe et al., 315 U. S. 722, 728 (1942).

Particularly in point is *International Brotherhood of Electrical Workers, Local No. 953, A. F. of L. v. Wisconsin Employment Relations Board et al.*, 245 Wis. 532, 15 N. W. 2d. 823 (1944), wherein it appears that the National Labor Relations Board had assumed jurisdiction in a certification case, and, before election, had dismissed the petition. Thereafter, the Wisconsin Board directed an election among the employees. Upon that factual basis, which is practically identical to the factual situation in the instant case, it was said by Chief Justice Rosenberry at pages 826, 827, 828, that: (Italics ours)

"This case is argued as if the National Labor Relations Board had entertained and proceeded under sec. 9(c) of the National Labor Relations Act and certified the name of I.B.E.W. as the bargaining representative of the employees of the company. We do not so interpret the decision of the National Labor Relations Board. *While in the course of its findings of fact it stated that I.B.E.W. was an appropriate bargaining agency, it did not make any certificate but on the contrary dismissed the proceeding.* We find nothing in the National Labor Relations Act that gives a mere recital or a finding of fact any efficacy. *In order to establish the union as the bargaining agent of the employees, an election must be held and the result duly certified as required by the act.* It is the certificate provided for under sec. 9(c) or an order under the provisions of sec. 10(c) that vitalizes the proceeding before the board. * * *

* * * * * * * * *

"*We are unable to see any conflict of policy between the National Labor Relations Act and the Employment Peace Act.*" * * *

"The policy is the same in both acts. *The method by which the bargaining agent is chosen differs but that does not constitute a difference in policy. If in a particular case the National Labor Relations Board takes jurisdiction of course its determination is superior in legal effect to that of the determination of the state board, if there is a conflict. In this case the National*

*"board having declined to take jurisdiction, there is no conflict in policy or method. * * * "*

The decision just cited is in harmony with all judicial decisions that concurrent jurisdiction exists until the National Labor Relations Board issues an order by which paramountcy of federal jurisdiction is established. For example, it was said by Minton, J., in the opinion of the United States Circuit Court of Appeals of the Seventh Circuit in *National Labor Relations Board v. Eclipse Moulded Products Co.*, 126 F. 2d 576, 578 (1942) that:

(Italics ours)

" * * The National Labor Relations Board in its proceedings is administering Federal law within the sovereign limits of the Federal Government, while the Wisconsin Board is administering Wisconsin law within the sovereign limits of Wisconsin. There are two sovereignties in the same territorial area.*

*There is not necessarily a conflict, as these two Boards operate in the same territory but in different spheres. Until conflict or interference between the two arises, there is no choice to be made as to which shall be paramount. The question of paramountcy is not determined by which one's jurisdiction was first invoked. Conflict may develop between the action of the State Board and that of the National Labor Relations Board that may require a determination of which shall be paramount. * * *"*

This also was the conclusion of the courts of Pennsylvania. For example, in a carefully considered opinion, it

was said by Sherwood, P. J., of the Court of Common Pleas of York County, Pennsylvania, *In Re York Corporation*, 55 District & County Reports (Pa.) 337, 342 (1945): (Italics ours)

> "Does conflict develop when the National Labor Relations Board orders an investigation, or does conflict develop only when the National Labor Relations Board makes an order determinative of the issues involved in the petition over which it assumes jurisdiction? *Judicial authority supports the contention that the Pennsylvania Labor Relations Board cannot be ousted of its jurisdiction, at least, until the National Labor Relations Board makes an order which is determinative of the issues involved in the proceeding before the Pennsylvania Labor Relations Board. It is only when there is a definitive order of the National Labor Relations Board that the question of paramountcy of jurisdiction arises. It would seem that the question of paramountcy of jurisdiction does not arise until the National Labor Relations Board issues a definitive order,* * *"

Undoubtedly, the Wisconsin Employment Relations Board properly issued a certification in the instant case, unless Your Honorable Court in *Bethlehem Steel Company et al. v. New York State Labor Relations Board*, 330 U.S. 767 (1947), has adopted a new canon of judicial construction of federal statutes which renders practically all previous judicial authority obsolete and without present effect.

(2)

The Bethlehem Steel Company decision has no application to the instant case.

In *Bethlehem Steel Company, et al. v. New York State Labor Relations Board, supra*, the appeals challenged the validity of the New York State Labor Relations Act as applied to a manufacturing corporation to permit unionization of foremen. However, there is nothing in the opinion of Mr. Justice Jackson in that case to indicate an intended ruling that a state agency is without power to administer the state act with respect to charges of unfair labor practices against employers, employees or unions, provided that the state policy is not contrary or repugnant to Federal policy. It was because of the decision in *Packard Motor Car Co. v. National Labor Relations Board*, 330 U.S. 485 (1947), holding that foremen have an absolute right to organize in foremen unions under the National Labor Relations Act, that the power of the New York agency to exercise jurisdiction over units limited to foremen did not exist. The sole objection to state jurisdiction in the Bethlehem Steel Company case was the oft repeated rule of Federal construction that, in a given case, state jurisdiction is ousted when the state statute, or state administration thereunder, "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress:"

Hines et al. v. Davidowitz et al., 312 U.S. 52, 66, 67 (1941);

Hill et al. v. State of Florida, 325 U.S. 538, 542 (1945).

It was said by Mr. Justice Jackson in

Bethlehem Steel Co. et al. v. New York State Labor Relations Board, supra, at page 776 (italics ours):

"• • • The federal board • • • asserts, and rightfully so, under our decision in the Packard case, supra, its power to decide whether these foremen may constitute themselves a bargaining unit. We do not believe this leaves room for the operation of the state authority asserted."

The contention of the Commonwealth of Pennsylvania has the support of the three well considered decisions of the Supreme Court of Wisconsin now before this Court for review.

In *Wisconsin Employment Relations Board v. Algoma Plywood & Veneer Co.*, 252 Wis. 549, 32 N.W. 2d 417, 420, 421 (1948), there is a comprehensive discussion of *Bethlehem Steel Co. v. New York State Labor Relations Board, supra.* It was said by Wickham, J., that (italics ours):

"We now come to the case of Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767, 67 S. Ct. 1026, 1028, 91 L. Ed. 1234. That case dealt with a situation in which the New York State Labor Board had permitted foremen to organize to constitute a collective bargaining unit. The question whether foremen should consistently with the policy of the national

act be organized as a bargaining unit had had various solutions by the National Board. In the beginning it had recognized the rights of the foremen and 'later, there was a period when, for policy reasons but without renouncing jurisdiction, it refused to approve foreman organization units.' The application of the foremen to the state board was the result of this policy on the part of the national board. *Later during the pendency of the case in the courts of the state of New York the Supreme Court in Packard Motor Car Company v. National Labor Relations Board,* 330 U.S. 485, 67 S. Ct. 789, 91 L. Ed. 1040, *had held that the national act entitled foremen to the rights of self-organization under the act.* The court in the Bethlehem case (330 U.S. 767, 67 S. Ct. 1030) follows the decision in the Allen-Bradley case to the effect that in the national act congress has 'sought to reach some aspects of the employer-employee relations out of which such inferences arise. * * * Where it leaves the employer-employee relation free of regulation in some aspects, it implies that in such matters federal policy is indifferent, and since it is indifferent to what the individual of his own volition may do we can only assume it to be equally indifferent to what he may do under compulsion of the state,' citing the Allen-Bradley case. It was held, however, following the case of Hill v. State of Florida, 325 U.S. 538, 65 S. Ct. 1373, 89 L. Ed. 1782, that 'the power of the state may not so deal with matters left to its control as to stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" '. *The court concluded that*

where Congress had implemented the act by the delegation of rulemaking power to an administrative body and where that body in the exercise of its delegated power has adopted a rule of policy the state power is abrogated, at least so far as the subject matter of the rule is concerned. While the state regulation in some fields may be invalid even though a particular phase of the subject has not been covered by rule it was held that where the measure in question relates to what might be considered a separate or distinct segment of the matter, the states are generally permitted to exercise their police power as to the matters omitted by the administrative rules. It is said, however, that 'the conclusion must be otherwise where failure of the federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute.' The court points out that the failure of the National Labor Relations Act to entertain the foremen's petitions was of the latter class; that the board had never denied its jurisdiction over the petitions and had made it clear that its refusal to designate foremen's bargaining units 'was a determination and an exercise of its discretion to determine that such units were not appropriate for bargaining purposes.' The court then says:

'The State argues for a rule that would enable it to act until the federal board had acted in the same case. But we do not think that a case by case test of federal supremacy is permissible here. The federal board has jurisdiction of the industry in which these particular

employers are engaged and has asserted control of their labor relations in general. * * * We do not believe this leaves room for the operation of the state authority asserted.' * * *

The Bethlehem case has limited the case-by-case doctrine commonly attributed to the Wisconsin decisions only to the extent of holding that where there has been a valid general exercise of its administrative power by the National Labor Relations Board neither repugnant provisions of the state law nor repugnant policies of the state board are effective to defeat the purpose and policy of the exercise. See 'The Taft-Hartley Act and State Jurisdiction Over Labor Relations', Russel A. Smith, 46 Michigan Law Review 593 at page 609, where in commenting upon the Bethlehem case it is said:

'On its facts the case is easily understood simply as an application of the doctrine that state regulation cannot be permitted to frustrate national policy — in this situation a policy definitely adverse to foremen unionization, not merely neutral in the matter'."

For reasons so clearly stated in the decision last cited, "a case by case test of federal supremacy", which is not permissible in a certification case where federal authority has been asserted over a group or class of employees, such as foremen of an industrial establishment, which group or class is capable of constituting an "aspect" of the general employer-employee relationship, or "a separable or distinct segment" of the general employer-employee relationship, is permissible in a case, like the instant case, where no

specific group or class of employees is involved wherein it can be said that federal authority has been asserted. The instant case is analogous to the situation which prevailed among foremen when, for policy reasons but without renouncing jurisdiction, the National Labor Relations Board refused to approve foremen organization units: *Bethlehem Steel Company v. New York State Labor Relations Board, supra,* at page 770.

It is because the Notional Labor Relations Board has never formulated a distinct policy with respect to the employees of local communications companies, such as the La Crosse Telephone Corporation, that the Bethlehem Steel Company decision is not controlling in the instant case.

(3)

Congress in enacting the Labor Management Relations Act, 1947, did not intend to strike down the Wisconsin Employment Peace Act.

In *Rice et al. v. Santa Fe Elevator Corporation et al.*, 331 U.S. 218, 230 (1947), after stating the dominant Federal canon for the construction of Federal statutes, to wit: "*the historic police powers of States (are) not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress,*" Mr. Justice Douglas says that the purpose of Congress may be evidenced in several ways. Four ways are specified as follows:

1. "The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."

2. "The Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."

3. "The object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose."

4. "The State policy may produce a result inconsistent with the objective of the federal statute."

It cannot be said that the scheme for federal regulation provided in the Labor Management Relations Act, 1947, is

so pervasive as to make reasonable an inference that Congress left no room for Wisconsin to supplement it. It is as true of the Labor Management Relations Act, 1947, as it was of the National Labor Relations Act of 1935, that Congress intended "to exercise whatever power is constitutionally given to it to regulate commerce by the adoption of measures for the prevention or control of certain specified acts—unfair labor practices — which provoke or tend to provoke strikes or labor disturbances affecting interstate commerce:" *National Labor Relations Board v. Fainblatt et al.*, 306 U.S. 601, 607 (1939). Where Congress intends to prevent strikes or labor disturbances through a regulation of commerce, it can not be presumed that Congress intended to prevent Wisconsin from preventing strikes or labor disturbances within its borders by the same processes which Congress has approved.

Certainly the Wisconsin statute may exist and be administered by the state agency because as was said by Chief Justice Hughes in *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U.S. 1, 37 (1937). (italics ours):

> "* * * Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. * * * The question is necessarily one of degree. * * *"

(4)

The Labor Management Relations Act, 1947, does not exhibit a clear and manifest purpose of Congress to preclude the enforcement of state laws with respect to the investigation and certification of bargaining representatives.

The Wisconsin Labor Relations Act of 1937 and its successor, the Wisconsin Employment Peace Act, like the Pennsylvania Labor Relations Act, have been in force and effect since 1937. There has been little or no conflict between the Federal agency and the state agencies with respect to administration. Doubtless this absence of conflict has resulted from the fact that there is a relatively small twilight zone wherein conflict could normally have arisen. The National Labor Relations Board has unquestioned jurisdiction over the large employers of industry whose activities are nation-wide in scope. In the main, the state agencies have assumed jurisdiction over labor disputes where the employer is engaged in a business which is essentially local, or, at least, where the labor dispute among the employees of a large employer is limited to employees who work within the confines of the state, and only then, when Federal jurisdiction has not been invoked with respect to the state employees.

As the purpose of the Federal legislation is not primarily to regulate commerce, but to secure and preserve

industrial peace, it can not be said that the Federal interest is so dominant that the state be precluded from applying its own policy, when not inconsistent with Federal policy, to secure and preserve industrial amity and good will.

The Labor Management Relations Act, 1947, is not analogous to the Alien Registration Law of 1940, by which a standard for alien registration in a single integrated and all-embracing system was provided. In that instance, the Federal interest was so dominant as to preclude enforcement of the Pennsylvania Alien Registration Act: *Hines et al. v. Davidowitz et al., supra.* Neither is the Labor Management Relations Act, 1947, analogous to the United States Warehouse Act regulating warehouses engaged in the storage of grain for interstate or foreign commerce. Such warehouses were clearly in the Federal domain, and in that Act, Congress exerted such a pervasive regulatory authority as to prove a legislative intent to make the legislation all embracing and exclusive, as was held in *Rice et al. v. Santa Fe Elevator Corp., et al., supra.* These and like cases are to be distinguished from the instant case because it is apparent that if Wisconsin, Pennsylvania, and other states having labor relations acts patterned upon the Federal statute, are to be prohibited from administering the state statutes, there will be a substantially large number of labor disputes, some of which may impair or interrupt the free flow of commerce, which can not be the subject of administrative relief, either Federal or state.

Inasmuch as there has been complete cooperation between the Federal agency and the state agencies in achieving the remedial purposes of the Federal legislation,

this is a situation which calls for the application of the rule stated by Mr. Justice Frankfurter in *Union Brokerage Co. v. Jensen et al.*, 322 U.S. 202, 209 (1944), that (italics ours):

"* * * *Where the Government has provided for collaboration the courts should not find conflict.* * *"

A comparison of Section 9 of the Labor Management Relations Act, 1947, to be found on pages 45-48 of this brief, with the provisions of Section 111.05 of the Wisconsin Employment Relations Act, to be found on pages 49-51 of this brief, will show that Wisconsin policy is neither contrary to nor repugnant to Federal policy, with respect to the determination of collective bargaining units, the holding of elections or the certification of bargaining representatives. This fact calls for the application of the rule that "the historic police powers of states are not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."

It should be noted in this connection that Section 10 (a) of the Labor Management Relations Act, 1947, which provides for the ceding of jurisdiction by the National Labor Relations Board to a state agency, under certain circumstances, applies only to charges of unfair labor practice. There is nothing in the Labor Management Relations Act, 1947, which gives the National Labor Relations Board the power to cede jurisdiction in a certification proceeding. Neither is there anything in the Labor Management Relations Act, 1947, which expressly confers exclusive jurisdiction in certification proceedings upon the National Labor Relations Board or excludes a state agency from exercising concurrent jurisdiction.

Applying to the instant case, the rule laid down in *Rice et al. v. Santa Fe Elevator Corporation et al.*, that other than by expressed language, the purpose of Congress to exclude state jurisdiction may be evidenced in four specific ways, we will consider the first, namely: "the scheme of Federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it."

We are here considering a provision which does not directly affect commerce at all. Neither does it affect the rights of employers who are engaged in interstate commerce. It has been said that "a certification proceeding is of a nonadversary, fact finding character in which the Board plays the part of a disinterested investigator seeking merely to ascertain the desires of the employees as to their representation:" *Southern S. S. Co. v. National Labor Relations Board*, 120 F. 2nd 505, 506, 507 (1941). "The function of the Board and the employer, therefore, in these hearings is merely to develop the facts relating to the right of the single claimant to speak for all the employees. The only persons directly affected by the Board's finding that there is a majority are the employees who have not authorized the union to speak for them:" *National Labor Relations Board v. National Mineral Co.*, 134 F. 2d 424, 426 (1943). "Generally representation and unfair practice proceedings are distinct, both in issues and in the relief sought. Procedure and evidence also differ. But they may and often do overlap. Representation may be involved and determined in unfair practice proceedings * * * and unfair practices may affect representation. * * * Nothing in the

section specifies the time at which the conjunction must take place or limits the Board's power to making it prior to an order for an election or any other step short of final decision in the representation proceeding." *Warehousemen's Union, etc. v. National Labor Relations Board*, 121 F. 2d 84, 94 (1941).

Certainly the scheme of Federal regulation provided for in the Labor Management Relations Act, 1947, should not be held to be so pervasive as to refuse to permit employees to select a bargaining agent under state authority.

For the same reason, it cannot be said that the Act of Congress touches a field in which the Federal interest is so dominant that the Federal system will be assumed to preclude enforcement of state laws by which a state agency is empowered to assist state employees to determine their bargaining agency.

The objects sought to be obtained by the Federal law and the character of obligations imposed by it do not show an intent on the part of Congress to bar the state agency from aiding the employees in the selection of their representative. In this connection, it should be noted that the certification of bargaining representative imposes no obligation upon anyone. All that any labor board can do in a certification proceeding is certify. Strictly speaking, a so-called order of certification is merely a certification of the result of an election made by the Board to the employer and the interested employees, and there can be no Court review of the certification unless or until the Board issues

a future order which requires the employer to do something predicated upon the result of the election. *National Labor Relations Board v. Falk Corporation*, 308, U.S. 453; 459 (1940).

It is inconceivable that Congress intended that such an order could only be made by the National Labor Relations Board.

The instant case calls for the application of the rule laid down in *Union Brokerage Co. v. Jensen et al., supra*, at page 212, wherein it was said by Mr. Justice Frankfurter that (italics ours):

> "*The Commerce Clause does not deprive Minnesota of the power to protect the special interest that has been brought into play by Union's localized pursuit of its share in the comprehensive process of foreign commerce.* * * *By its own force that Clause does not* * * *preclude a State from giving needful protection to its citizens in the course of their contacts with business conducted by outsiders when the legislation by which this is accomplished is general in its scope, is not aimed at interstate or foreign commerce, and involves merely burdens incident to effective administration.* * * *"*

The Wisconsin Employment Peace Act is to be distinguished from the Florida statute requiring labor unions to make certain reports and obtain a license because such a statute conflicted with the National Labor Relation Act which required an employer to bargain with a properly selected union agent despite his failure to secure a Florida

license: *Hill et al. v. State of Forida, supra.* It is also to be distinguished from *American Federation of Labor et al. v. Watson*, 327 U.S. 582 (1946), wherein the Attorney General of Florida and others were enjoined enforcement of a constitutional provision of the State of Florida which provided that the right of persons to work shall not be denied or abridged on account of membership or non-membership in a labor organization, unless such provisions should be construed by the courts of Florida not to deny or abridge the right of employees, through their representative, to bargain collectively with their employer. The ground of these decisions and many others of like character all rest on the proposition that state legislation shall not contravene federal policy. The Wisconsin statute, to the contrary, does not stand as an obstacle to the federal policy of collective bargaining. It encourages collective bargaining by affording a method by which employees may choose their representative and compel the employer to bargain collectively. It should not be ruled that the Wisconsin statute is unconstitutional or void on the theory that it is contrary or repugnant to federal policy.

Furthermore, the Wisconsin Employment Relations Act declares in Section 111.01(4) that "It is the policy of the state, in order to preserve and promote the interests of the public, the employee and the employer alike, to establish standards of fair conduct in employment relations and to provide a convenient, expeditious and impartial tribunal by which these interests may have their respective rights and obligations adjusted. While limiting individual and group rights of aggression and defense, the state sub-

stitutes processes of justice for the more primitive method of trial by combat." It is clear and certain that the Labor Management Relations Act, 1947, should not be held to impliedly evince an intent to strike down the Wisconsin statute or preclude its administration by the Wisconsin Employment Relations Board, in view of the public policy proclaimed in the Wisconsin Employment Peace Act,

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(5)

CONCLUSION

It is urged that consideration of the instant case should be upon the facts of the case, in harmony with the long established rule that constitutional questions will be dealt with only as they are appropriately raised upon a record before the court:

Allen-Bradley Local No. 1111 etc., et al. v. Wisconsin Employment Relations Board, supra;

Tennessee Publishing Co. v. American National Bank, et al., 299 U.S. 18 (1936),

and that a court should not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied:"

Alabama State Federation of Labor, etc., et al. v. MacAdory et al., 325 U.S. 450 (1945);

International Shoe Co. v. State of Washington, etc., et al., 326 U.S. 310 (1945).

Inasmuch as neither the La Crosse Telephone Corporation nor any of its employees have been subject to the jurisdiction of the National Labor Relations Board, the certification of a bargaining representative for the employees of the La Crosse Telephone Corporation in an appropriate unit was a valid exercise of the police power of Wisconsin. Accordingly, the judgment of the Court below should be affirmed.

Respectfully submitted,

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APPENDIX 1.

The pertinent provision of the Labor Management Relations Act, 1947, is Section 9, to be found in 29 U.S.C.A., Section 159 (pocket part), which is as follows:

Section 159. Representatives and elections — Exclusive representatives, employees', adjustment of grievances directly with employer

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

DETERMINATION OF BARGAINING UNIT BY BOARD

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercis-

ing the rights guaranteed by this sub-chapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

Hearings on questions affecting commerce; rules and regulations

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf

alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longe a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 160 (c) of this title.

(3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling. * * *

APPENDIX 2

The pertinent provision of the Wisconsin Employment Peace Act (Wisconsin Laws of 1939, Chapter 57, as amended) is Section 111.05 which relates to representatives and elections and is as follows:

111.05 Representatives and elections. (1) Representatives chosen for the purposes of collective bargaining by a majority of the employes voting in a collective bargaining unit shall be the exclusive representatives of all of the employes in such unit for the purposes of collective bargaining, provided that any individual employe or any minority group of employes in any collective bargaining unit shall have the right at any time to present grievances to their employer in person or through representatives of their own choosing, and the employer shall confer with them in relation thereto.

(2) Whenever a question arises concerning the determination of a collective bargaining unit as defined in section 111.02 (6), it shall be determined by secret ballot, and the board, upon request, shall cause the ballot to be taken in such manner as to show separately the wishes of the employes in any craft, division, department or plant as to the determination of the collective bargaining unit.

(3) Whenever a question arises concerning the representation of employes in a collective bargaining unit the

board shall determine the representatives thereof by taking a secret ballot of employes and certifying in writing the results thereof to the interested parties and to their employer or employers. There shall be included on any ballot for the election of representatives the names of all persons submitted by an employe or group of employes participating in the election, except that the board may, in its discretion, exclude from the ballot one who, at the time of the election, stands deprived of his rights under this chapter by reason of a prior adjudication of his having engaged in an unfair labor practice. The ballot shall be so prepared as to permit of a vote against representation by anyone named on the ballot. The board's certification of the results of any election shall be conclusive as to the findings included therein unless reviewed in the same manner as provided by subsection (8) of section 111.07 for review of orders of the board.

(3m) Whenever an election has been conducted pursuant to subsection (3) in which the name of more than one proposed representative appears on the ballot and results in no conclusion, the board may, in its discretion, if requested by any party to the proceeding within 30 days from the date of the certification of the results of such election, conduct a run-off election. In such run-off election, the board may drop from the ballot the name of the representative that received the least number of votes at the original election, or the privilege of voting against any representative when the least number of votes cast at the first election was against representation by any named representative.

(4) Questions concerning the determination of collective bargaining units or representation of employes may be raised by petition of any employe or his employer (or the representative of either of them). Where it appears by the petition that any emergency exists requiring prompt action, the board shall act upon said petition forthwith and hold the election requested within such time as will meet the requirements of the emergency presented. The fact that one election has been held shall not prevent the holding of another election among the same group of employes, provided that it appears to the board that sufficient reason therefor exists.